Supreme Court, U.S.
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NO. 95-386

IN THE

# Supreme Court Of The United States

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,

*Petitioners,*

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA**

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## REPLY BRIEF ON THE MERITS

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## STATEMENT OF THE CASE

There has been no discovery in this action. No depositions have been taken; no interrogatories have been propounded. (R. 1- 429). Hence, our requested relief, in the petition for certiorari granted by this Court, that after reversal of the Alabama Supreme Court's *res judicata* decision "the case be remanded for trial." (Petition for Certiorari, p. 11). Jefferson County, for the first time in its Brief of Respondents, disputes Petitioners' claim that paragraph 1(B) of Ordinance 1120 exempts employees of the businesses it excludes. The ordinance provides: "The words 'vocation, occupation, calling and profession' . . . shall not mean or include . . . businesses, professions or occupations for which license fees are required under . . . Title 40, §§ 40-21-52 [freight lines and equipment companies], 53, 54, 55 [public utilities], 58 [telephone businesses], 59 [telegraph businesses], 60 [express companies], 40-16-6 [financial institutions] and 27-4-9 [insurers]." (Appendix to this brief, p. A-19) The County now claims to have been collecting the tax from "almost all natural persons" employed by these businesses. (Brief of Respondents, p. 17) If so, it is a matter which would logically emerge during discovery. Petitioners cannot, at this point, concede that these employees are properly paying the tax if, in fact, they are.

Submitted herewith, via one last appendix for this Court's consideration, are documents which address Respondents' arguments, in brief, that Petitioners suffer from "an enormity . . of misconception" regarding exemption of insurance companies, express companies, railroads and banks (Brief of Respondents, p. 18); which refute Jefferson County's allegation that if it loses this case it faces a "daunting political challenge" persuading the Alabama Legislature to take simple steps to correct the constitutional deprivations inherent in its occupa-

tional tax exemption scheme (Brief of Respondents, p. 27); and which further refute Jefferson County's claim that "the only sizeable class of natural persons who are not subject to the Occupational Tax comprise the state-regulated professions." (Brief of Respondents, p. 48). These appended documents are: Paragraph 1(B) of the tax itself; a Birmingham Bar Association Memorandum attached to a bill introduced in the Alabama Legislature which, if enacted, would have easily eliminated the exemptions complained of by Richards and Hill; and a pleading filed by federal district judges sitting in Jefferson County which addresses the irrationality of the tax exemption scheme by revealing that "preachers" in the county, though not exempt from the tax, are not required by Jefferson County to pay it.

We respectfully submit that these are but three of many matters addressing the merits of the equal protection claims of Richards and Hill which deserve to be made the subject of discovery, and, thereafter, a judgment in the trial court. Hence, our contention that the posture of this case in this Court is such that it should be reversed on the *res judicata* grounds stated in our Petition, and remanded for a trial upon the merits of Richards' and Hill's federal equal protection claims.

## ARGUMENT

### RESPONDENTS' HISTORY OF HOW THE EXEMPTION SCHEME BUILT INTO THE JEFFERSON COUNTY OCCUPATIONAL TAX "GOT SO BAD" DOES NOT EXCUSE AN IRRATIONAL DENIAL OF EQUAL PROTECTION TO RICHARDS AND HILL

Following a lengthy and protracted historical apology for how the exemption scheme built into Jefferson County's Occupational Tax became the albatross that it



is, Respondents assert that it should be left undisturbed because: (1) it is an "economic and political snapshot of an essentially rural and undeveloped state prior to World War II" and (2) the County considers it to have harmlessly evolved to accommodate "professions, learned and otherwise" and callings involving "quaint, obsolete or transient activities" beyond its control. (Brief of Respondents, pp. 2-20) This ignores the fact that we now know Jefferson County compounds the facial irrationality of its tax exemption scheme by exempting "preachers" — an odd classification not exempted anywhere on the face of the tax — by simply refusing to collect from them. (Appendix to this Reply Brief, p. A-9). It also ignores simple mathematics. A manicurist pays $5.00 a year to the state for a license, and completely avoids the tax. (Appendix to Brief of Respondents, p. A-57) A veterinarian does likewise, to like effect. (Appendix of Brief of Respondents, p. A-94) A preacher pays nothing. As the bill which would have eliminated the exemptions complained of here makes clear, a deduction only for license fees paid to the county might be a logical method for correcting the federal constitutional deprivations now before this Court, but even then there would be no rational basis for equating license fees paid to the state with occupational tax payments made to the county. License fees paid to the state offer a license holder a measure of exclusivity, lessened competition, and, in some cases, self regulation. License fees are not in any way comparable to tax payments which benefit the County treasury. A similar bill, if enacted, would simply correct the tax exemption imbroglio which is now before this Court.

Respondents candidly admit that the Alabama Legislature was a lobby interest for big business in 1927, when the license scheme which underpins the exemptions here in issue emerged. (Appendix to Brief of Respondents, A-200) The Birmingham Bar Association Memo-

randum appearing in the appendix to this brief proves little has changed since. Today in Alabama, professions which employ lobbyists and those which enjoy exemption from the Jefferson County Occupational Tax are frequently the same. All too often, their interest in enjoying exemption from this tax is effectively balanced against imposition of an irrational burden on citizens like Richards and Hill only by the United States Constitution, and only by this Court.

Respondents raise the issue of legislative corrective action in a footnote, citing this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), and shuddering as they speculate upon the possibility of paying a refund of taxes unconstitutionally collected. Shortly after this Court handed down its decisions in *Davis, supra*, a group of Alabama citizens similarly situated to the *Davis* plaintiffs filed suit seeking similar relief. *Sizemore v. Rinehart*, 611 So.2d 1064 (Ala. Civ. App. 1992) writ quashed, 611 So.2d 1064 (Ala. 1993). The taxpayer plaintiffs in *Sizemore* obtained not only a refund for a class of taxpayers situated similarly to Richards and Hill, but also a reasonable and swift amendment, in the Alabama Legislature, to the state statutes which were offensive to this Court's decision in *Davis*. The Alabama Court of Civil Appeals noted with approval the wisdom and dispatch of the Legislature's reaction to *Davis*:

> We note that the amount of refunds due to be paid to the class in this case exceeds $17,700,000. This court is mindful of the impact this amount of refund will have on the state's treasury; however, refusing to follow a decision of the United States Supreme Court would be an act of futility and show a lack of judicial responsibility.
>
> . . .



> We further note that, in response to the *Davis* decision, the Alabama legislature enacted Act No. 90-596 which amended 40-18-19 and 40-18-20, Code 1975, granting a full exemption from Alabama income tax to the members of this class, so that these taxation statutes would not be in violation of 4 U.S.C.A. 111 (West 1985) and the doctrine of intergovernmental tax immunity.
>
> 611 So.2d at 1069

We therefore contend that Jefferson County's claim that "[t]here is simply no way that the county could meet its current governmental responsibilities, while at the same time absorbing the loss of the occupational tax and financing a refund of the cumulative taxes collected and spent since January 1, 1988" is flat wrong. It can do both, expeditiously, by imposing a tax which meets constitutional muster on the many currently exempted occupations described in our petition, or it can exempt all and choose to impose a tax of a wholly different character upon its citizens. But one thing is certain: our legislature knows how to act promptly and efficiently to follow a decision by this Court, as it did in the wake of *Davis v. Michigan Department of Treasury, supra*, and has done on numerous occasions when this Court has made known to Alabama the error of its statutory ways.

## *HANSBERRY v. LEE*, AND *MARTIN v. WILKS* DIRECTLY REFUTE THE *RES JUDICATA* ARGUMENTS MADE IN JEFFERSON COUNTY'S BRIEF

In *Hansberry, supra*, this Court described in terms of notice and an opportunity to be heard, exactly how it handles a *res judicata* issue like the one in this case:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.
>
> 311 U.S. at 40

Jefferson County is well aware that neither Richards nor Hill had any notice or opportunity to be heard upon their federal equal protection claims — or any others, for that matter — when the *Bedingfield* case was tried. Therefore it adopts in brief, three fallback positions, none of which is persuasive. The first it calls "virtual representation . . . pragmatically established." (Brief of Respondents, pp. 29-31) In the second it maintains that what the Alabama Supreme Court really meant to describe in the opinion below was "issue preclusion" (Brief of Respondents, p. 32), and in the third it maintains that a virtual privity concept should somehow be designed to link the *Bedingfield* plaintiffs to Richards and Hill. (Brief of Respondents, p. 33-36) (This third position is Jefferson County's oddest, because it basically seeks reversal of *Martin v. Wilks, supra, sub silentio.*)

No amount of pragmatism can change the fact that three arcane state law issues, and only those three issues,



were heard and decided by the trial and appellate courts in *Bedingfield, supra.* Nothing can change the fact that the *Bedingfield* plaintiffs had never paid the occupational tax, therefore lacking standing to complain about those exempted. Still, Jefferson County cites a few obscure virtual representation cases, omitting reference to the "adequacy of representation" component of each which is missing in this case. In *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84 (5th Cir. 1977) cert. den. 434 U.S. 832 (1977) and *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), the Fifth and Eleventh Circuit Courts of Appeals, respectively, held that privity of the stripe urged by Jefferson County exists only where nonparties to a first action were "adequately represented" by the parties in an original action. *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d, at 100; *N.A.A.C.P. v. Hunt*, 891 F.2d, at 1561. Moreover, the *Southwest Airlines Co.* case involved first case representation by a government authority, and the *N.A.A.C.P.* case involved first and second case representation by a common plaintiff who appeared individually, and as a member of both the N.A.A.C.P. and the Alabama legislature, in both actions. See also, Footnotes 55 and 59, *Southwest Airlines Co., Inc., supra.*

Jefferson County also suggests that the Alabama Supreme Court's decision "would be more defensible" had it reached the same result as a matter of "issue preclusion". In that vein it cites *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930) for the proposition that omitted mention of an issue "distinctly presented" did not, in that case, render that issue undecided. *Grubb* was a case involving a particular bus route excluded from a certificate of authority issued by the Ohio Public Utilities Commission. Unlike the case at bar, it involved an identical plaintiff in both suits, and actual presentation of the exact same constitutional issue in both. This Court's conclusion in *Grubb* ("[A] judgment upon the merits in one

suit is *res judicata* in another *where the parties and subject matter are the same.*" 281 U.S., at 479) (Emphasis supplied) is one with which we have no quarrel. It is simply not applicable to this action involving different parties and a different subject matter in different lawsuits.

The final fallback position pressed by Jefferson County seeks to force privity onto the *Bedingfield* plaintiffs and Richards and Hill by describing both suits as involving "the same public question", and considering the very different claims of Richards and Hill to be nothing more than assertive of an "illusory private right". (Brief of Respondents, pp. 28-29, 32-33) Nothing in the record, or elsewhere, supports this odd contention. Indeed, Alabama Associate Justice Maddox (who was a Justice upon the Alabama Supreme Court when *Bedingfield* was decided) recalls otherwise:

> The trial judge, in denying the defendants' motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata*), issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust, and improper classification of citizens subject to the tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. 111) as it pertains to federal employees." I agree with the trial court on both points.
>
> In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield*, a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical*, it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the res judicata doctrine is so easily satisfied, then it could be extended ad infinitum and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.
>
> My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claims similar to them.
>
> Appendix to Petition, A-8,9

This recollection of the difference between the two actions is particularly instructive here because the majority does not contend otherwise. Petitioners' private class action claims, based on the irrationality of an exemption

scheme built into the tax, were not even similar to the claims adjudicated in *Bedingfield*. Without contradiction from the majority, Justice Maddox places the clear differences between parties and claims in the these two actions directly into the precedential path of *Martin v. Wilks, supra.*

If this Court meant what it said in *Martin*, none of Jefferson County's arguments are persuasive. Conversely, if those arguments here have merit, *Martin* is wrong and due to be reversed. In *Martin*, this Court resolutely held:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of a lawsuit.
>
> 490 U.S. at 765

Richards and Hill, of course, had no notice whatsoever of the case by which the Alabama Supreme Court determined them to be barred, and no opportunity to intervene. Their claims underscore the prescience of this Court's further observation, in *Martin*, that:

> [E]ven under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up.
>
> 490 U.S. at 768



Indeed, this Court recognized the likelihood of subsequent claims under the equal protection clause of the Fourteenth Amendment in cases involving occupational taxes years before in *Walters v. City of St. Louis, Missouri*, 347 U.S. 231 (1954). There, a municipal income tax ordinance was subjected to this Court's scrutiny because it treated profits of corporations and businesses differently from the wages of individuals. The St. Louis tax was upheld on an issue far removed from the one here — treating the gross receipts of corporations and individuals differently — but the collection status of the tax was similar to that of the Jefferson County Occupational Tax when *Bedingfield* was decided:

> A weakness of the appellants' case is that its anticipatory character precludes consideration of any contentions insofar as they depend upon actual application of the tax or the regulations promulgated for its administration. This action was commenced almost immediately after the Act became effective. A portion of appellants' wages has been withheld by their employer, *but the City has not yet collected the tax.* There is no evidence as to how the amount withheld from appellants compares with taxes collected from self-employed persons or businesses. The complaint attacks only the state legislative Act delegating power to the City of St. Louis and the taxing ordinance enacted by that City. (Emphasis supplied)
>
> 347 U.S. at 233

This failure of collection resulted in a concurring opinion by Justice Douglas, with whom Justice Black joined, regarding an anticipated future challenge, after collection of the tax:

> I am less confident than my Brethren that the Supreme Court of Missouri did not pass on the regulations as well as the ordinance. But I bow to their reading of the record, *saving for a future day the serious and substantial question under the Equal Protection Clause raised by the regulations which grant employers deductions for taxes paid the federal government, yet do not allow employees a deduction for the same tax.* (Emphasis supplied)
>
> 347 U.S. at 238

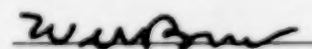
Jefferson County would, of course, contend that a subsequent challenge by different parties, mounting a different subject matter challenge to the tax (a "future day" question, in the parlance of Justice Douglas), should be barred by *res judicata*. That contention should not be seriously made today, after this Court's decision in *Martin*, because its logic would have left the firefighters in that action without their "own day in court", 490 U.S. 762, and Mr. Hansberry without a right to peacefully occupy his own home. 311 U.S., at 46. The same contention similarly robs Hill and Richards of due process of law by denying them their own day in court.



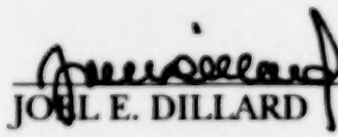
## CONCLUSION

The Equal Protection Clause protects Richards and Hill from arbitrary and irrational classifications like the constitutionally obnoxious ones built into the exemption scheme of the Jefferson County Occupational Tax, but only if they, and the class they represent, have a day in court. Richards and Hill come into this Court with a standing which is superior to that of the Birmingham firefighters in *Martin v. Wilks*, for the firefighters at least had notice through their association and local newspapers that a prior case existed. We therefore renew here our petition for reversal of the *res judicata* decision of the Alabama Supreme Court, and remand of this case to the trial court for a decision upon the merits of Jason Richards' and Fannie Hill's federal equal protection claims.

Respectfully submitted,



WILLIAM J. BAXLEY



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# APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

| | | |
|---|---|---|
| JEFFERSON COUNTY, a political subdivision of the State of Alabama, | ) | |
| Appellant, | ) | Case No. 94-6400 |
| vs. | ) | |
| WILLIAM ACKER and U. W. CLEMON, | ) | |
| Appellees. | ) | |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION CIVIL ACTION NOS. 93-M-0069-S AND 93-M-0196-S

## MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF BEFORE EN BANC PANEL

Come now James H. Hancock, Robert B. Propst, Edwin L. Nelson, Sharon Lovelace Blackburn and C. Lynwood Smith, Jr., pursuant to Rule 29, Federal Rules of Appellate Procedure, and respectfully move for leave to file *amici curiae* briefs in support of appellees' position before the *en banc* panel in the above-entitled appeal. The interest of movants is that we are Article III judges (as are appellees), whose performance of judicial duties are pur-

portedly subjected to licensing by appellant, Jefferson County, a state political subdivision. We are officers of the United States as that term is defined in Rule 29. Our brief is desirable in order to argue from our perspective how the subject ordinance unfairly discriminates against Article III judges, and effectively taxes and unduly burdens an essential function of the federal government.

We propose to refile a brief previously filed by four of us as *amici curiae* in support of appellees' application for rehearing and suggestion for rehearing *en banc* in the above entitled appeal and also a copy of the brief filed by the appellants in the case of *Richards, et al v. Jefferson County, Ala., et al*, No. 95-386, as to which the Supreme Court of the United States has granted *certiorari*. A copy of each of said proposed briefs is attached hereto.

/s/ James H. Hancock
JAMES H. HANCOCK

/s/ Robert B. PROPST
ROBERT B. PROPST

/s/ Edwin L. Nelson
EDWIN L. NELSON

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN

/s/ C. Lynwood Smith, Jr.
C. LYNWOOD SMITH, JR.

Proposed *Amici Curiae*



## CERTIFICATE OF SERVICE

I, one of the proposed *amici curiae*, hereby certify that I have on this 19th day of January, 1996, mailed a copy of the foregoing by U.S. Mail, postage prepaid, to the following attorneys of record at their addresses of record:

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IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

| | | |
|---|---|---|
| JEFFERSON COUNTY, a political subdivision of the State of Alabama, | ) | |
| Appellant, | ) | |
| v. | ) | Case No. 94-6400 |
| WILLIAM ACKER and U. W. CLEMON, | ) | |
| Appellees. | ) | |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION CIVIL ACTION NOS. 93-M-0069-S AND 93-M-0196-S



# AMICI CURIAE BRIEF OF JAMES H. HANCOCK, ROBERT B. PROPST, EDWIN L. NELSON AND SHARON LOVELACE BLACKBURN IN SUPPORT OF APPELLEES' APPLICATION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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PRO SE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA DIVISION

| | | |
|---|---|---|
| JEFFERSON COUNTY, a political subdivision of State of Alabama, | ) | |
| Appellant, | ) | |
| v. | ) | |
| | ) | CASE NO. 94-6400 |
| WILLIAM ACKER and U. W. CLEMON, | ) | |
| Appellees. | ) | |

## CERTIFICATE OF INTERESTED PERSONS

*Amici curiae* hereby certify as interested all persons listed in appellees' certificate of interested persons.

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## STATEMENT OF THE ISSUES

1. Whether Ordinance No. 1120 constitutes an income tax?
2. Whether Ordinance No. 1120 unfairly discriminates against federal judges?
3. Whether Ordinance No. 1120 unconstitutionally diminishes the salaries of those Article III judges who were appointed prior to its effective date?

## ARGUMENT

Pursuant to Rule 29, Federal Rules of Appellate Procedure, the undersigned, James H. Hancock, Robert B. Propst, Edwin L. Nelson and Sharon Lovelace Blackburn, active judges of the United States District Court for the Northern District of Alabama, being officers of the United States not requiring leave of court under Rule 29 in order to file an *amici curiae* brief, but obviously having a substantial interest in the outcome of this case, respectfully file the following brief *amici* in support of the application for rehearing and suggestion for rehearing *en banc* filed by appellees, William M. Acker, Jr. and U. W. Clemon.

*Amici* are in total agreement with Judge Moye, with the dissent of Chief Judge Gerald B. Tjoflat, and with appellees' brief on application for rehearing. We want this Honorable Court to understand, contrary to the possible implication contained in the panel's majority opinion, that after Judge Charles Moye's ruling in the lower court, *all* active district judges within the Northern District of Alabama, some of whom had previously paid Jefferson County's occupational license, discontinued paying it, and none have since paid it. We will hereinafter briefly state our reasons, keeping them short in order not to duplicate what has already been said.

### Is Ordinance No. 1120 an Income Tax?

The central proposition in the two-judge opinion is that what Jefferson County expressly calls its occupational license is not really an occupational license but an income tax. There are several flaws in the rationale employed by the panel majority in reaching this conclusion.

1. Alabama categorically forbids a county government from enacting an income tax. Jefferson County is not exempted from this express.



2. There would be no purpose in the language of Ordinance 1120 making illegal an activity performed and generating income in Jefferson County unless the intent of the ordinance is to require that the county grant its permission to perform a particular activity before a person can perform that activity in the county.

3. A tax which expressly exempts from its effect every person who holds a state license authorizing him or her to perform his or her occupation, without regard to how small his state license fee is in comparison to the dollar figure required to be paid by assessment of a percentage of income, as here exacted by Jefferson County, the taxing unit, from non-exempt occupations, cannot objectively or fairly be viewed as an income tax.

4. If Ordinance 1120 were a true income tax, clergypersons would be paying it, because Alabama understandably does not issue licenses to members of the clergy, any more than to federal judges. The fact that Jefferson County has chosen not to sue its preachers who fail to pay the license, despite no exemption, must be viewed as a clear concession by Jefferson County that this is not an income tax, because while the First Amendment's anti-establishment clause precludes a government's granting of a license to preach, it does not grant preachers an exemption from income taxation.

5. If Ordinance 1120 were a true income tax, it would not be based on a percentage of the *work* performed in Jefferson County. By its very nature this scheme is geared to the right to work in Jefferson County. Thus, the taxable event as to federal judges is the performance of their duties in Jefferson County, and therefore Jefferson County has effectively taxed an essential function of the federal government.

Does Ordinance No. 1120 Unfairly Discriminate Against Federal Judges?

The panel majority holds that the *"occupational tax does not discriminate against judges, vis-a-vis other professions"* and that the *"slight difference in economic burden does not compel a finding of discrimination."* (emphasis supplied). Slip Op. at p. 3159. We very respectfully point out that *no* "profession" except the judge's profession (if judging is a profession) pays Jefferson County's occupational license. All other professions except the clergy are licensed by the State of Alabama and are therefore exempt from the tax by the express terms of Ordinance 1120. Furthermore, not a dime of the $250 state license fee paid by a highly successful lawyer practicing in Jefferson County goes to Jefferson County, whereas *all* of the $670.00 (.5% of annual salary) claimed of the district judges (whose chambers unfortunately are in Jefferson County) would go to Jefferson County and none to the state. The fact that Jefferson County obtains nothing from resident attorneys and $670.00 from resident federal judges is facially discriminatory. Also, the term "economic burden" is broad enough to require consideration of the time and effort to accomplish the very strict record keeping that will be necessary to prove what is almost, if not entirely, impossible, namely, how much of our income was earned from work performed in one out of 31 countries. Such record keeping, if required, will constitute a very significant "economic burden."

Does Ordinance No. 1120 Unconstitutionally Diminish the Salary of Those Article III Judges Who Were Appointed Prior to Its Effective Date?

It is not only interesting but of great significance that the decision of a trial court cited by Jefferson County in its supplemental submission of January 6, 1994, shortly



before oral argument in this case, has recently been overruled by the appellate court to which it was appealed. In *Hatter v. United States*, — F.3d — (Fed. Cir. 1995), 1995 WL 517506, decided on August 30, 1995, the Court of Appeals for the Federal Circuit not only flatly disagreed with *Hatter v. United States*, 31 Fed. Cl. 436 (1994), but explained why *O'Malley v. Woodrough*, 307 U.S. 277 (1939), a case relied upon by the panel majority in the instant case, is not controlling on the issue here presented. Two of the appellants in *Hatter* are district judges sitting in Georgia, and one sits in Florida. If the Federal Circuit had been dealing with a county occupational license instead of with a Social Security deduction *applicable to every taxpayer*, its task would have been even easier. *Amici* do not want to be understood to be taking the position that the panel opinion in the instant case should not be vacated unless this Court, *en banc*, agrees with the Federal Circuit in *Hatter*, although Judge Moye confidently and correctly predicted the *Hatter* outcome.

## CONCLUSION

For the foregoing reasons, and for the others which have already been articulated, the undersigned respectfully suggest that this case is a proper case for *en banc* reconsideration and for the entry of a judgment in favor of appellees and against Jefferson County.

Respectfully submitted

/s/ James H. Hancock
JAMES H. HANCOCK

/s/ Robert B. Propst
ROBERT B. PROPST

/s/ Edwin L. Nelson
EDWIN L. NELSON

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN

PRO SE



## CERTIFICATE OF SERVICE

I, one of the above appearing *amici curiae,* hereby certify that I have on this 20th day of September, 1995, mailed a copy of the foregoing by U.S. Mail, postage prepaid, to the following attorneys of record at their addresses of record:

Irwin W. Stolz, Jr.
Seaton D. Purdom
One Peachtree Center, Suite 4300
303 Peachtree Street, N.E.
Atlanta, GA 30308

Jeffrey M. Sewell
Edwin A. Strickland
Jefferson County Attorney's Office
214 Jefferson County Courthouse
Birmingham, AL 35263

Carlos E. Heaps
2019 - 3rd Avenue North
Birmingham, AL 35203.

/s/ James H. Hancock
JAMES H. HANCOCK

MEMORANDUM

TO: All Members of the Birmingham Bar Association
FROM: Warren B. Lightfoot, President
RE: Proposed increase in Your Taxes

House Bill 527 (enclosed) which has been introduced in the state legislature appears to eliminate lawyers' exemption from the Jefferson County Occupational Tax. Currently, lawyers and others who are required to purchase a license from, or pay a privilege tax to, the State of Alabama or Jefferson County, are exempt from Jefferson County's Occupational tax. This exemption includes accountants, architects, dentists, doctors, engineers, optometrists, real estate agents and brokers, stock brokers, and many others. House Bill 527 would remove that exemption and authorize Jefferson County's governing body to levy a license or privilege tax at the rate of 1/2 of 1% of the annual gross receipts of those formerly exempt tax payers. You may wish to contact your state representative and/or senator concerning this bill. Printed below for your information is a draft of a letter which you may want to use in contacting your state representative or senator.

Since many of your clients may also be affected by this legislation, you may also want to notify them of this legislation so that they may contact their state representative and/or senator. Also printed below is a draft of a letter which you may want to utilize in notifying them of this proposed legislation.

DRAFT LETTER TO REPRESENTATIVE/SENATOR
RE: House Bill 527

The above bill has been brought to may attention. I live in your district, and I want to register my opposition to this bill and state the reason. It is my opinion that a



privilege tax on gross earnings imposed at the county level is not a desirable or appropriate revenue base for Jefferson County. From the perspective of the County, it simply serves to increase the competitive disadvantage the County now suffers relative to surrounding counties, particularly North Shelby County. The effect is to encourage businesses and professionals to locate in, or relocate to, other counties. Furthermore it is highly probable that this tax will be passed on to the consumers through higher fees. It is obvious to me and to many other voters and taxpayers, that this is a short-sighted revenue generating program.

I have an alternative suggestion. I urge you and our other representatives to support comprehensive tax reform, implemented statewide, and to reject band-aid approaches such as this Bill.

DRAFT LETTER TO CLIENTS:

House Bill 527 has been introduced in the state legislature to eliminate certain exemptions from the Jefferson County Occupational Tax. Currently, persons who are required to purchase a license from, or pay a privilege tax to, the State of Alabama or Jefferson County are exempt from Jefferson County's Occupational Tax. This includes accountants, architects, dentists, doctors, engineers, lawyers, optometrists, real estate agents and brokers, stock brokers and many others. House Bill 527 would remove that exemption and authorize Jefferson County's governing body to levy a license or privilege tax at the rate of 1/2 of 1% of the annual gross receipts of those formerly exempt tax payers. Since you will be affected by this legislation either through the loss of the exemption or from increased costs passed on by those who lose the exemption, you may wish to contact your state representative and/or senator concerning this bill. I

have enclosed for your information a draft of a letter which you may wish to use in contacting your state representative and/or senator. If you have any questions concerning this bill, do not hesitate to contact me.

H. 527 By McDowell and McClaim (With Notice and Proof)
R1 4/30/91
RFD Local Legislation No. 2

A BILL TO BE ENTITLED
AN ACT

Relating to Jefferson County, to amend Act No. 406, H. 832, 1967 Regular Session, so as to delete certain exemptions and provide the county commission with authority to levy an occupational tax upon all persons and businesses to limit the amount of such business or privilege tax, and to provide a deduction for other privilege tax paid to the county.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. The Title of Act No. 406, H. 483, 1967 Regular Session is hereby amended to read as follows:

"An act to authorize the governing body of any county of the state having a population of 500,000 or more, according to the last or any subsequent federal census, to levy a business or privilege tax *for revenue purposes* upon any business, vocation, occupation, calling or profession, ~~for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama~~, and to limit the amount of any such business or privilege tax, *and to provide a deduction from said privilege or license tax for amounts paid to the county pursuant to a state license code and to provide for collection of said tax and penalties for the enforcement thereof.*



Section 2. Sections 3, 4, 5 and 6 of Act No. 406, H. 832, 1967 Regular Session, are hereby amended to read as follows:

"Section 3. The purpose of this ~~Act~~ *act* is to ~~equalize the burden of taxation by authorizing~~ *provide authority to* the county *governing body* to impose a license or privilege tax upon persons *as defined herein for* ~~now~~ engaging in ~~certain~~ businesses ~~without paying any license tax thereon to either the state or county~~ *as defined herein in the county.*"

"Section 4. The governing body of the county is hereby authorized *for revenue purposes* to levy *and collect* a license or privilege tax upon any person for engaging in any business ~~for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51, Section 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended~~ *in the county and to allow a deduction from said tax for amounts actually paid for the use of the county by such person required for said business pursuant to a state license code or other state, license or privilege tax.*

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such persons is not required to pay any license or privilege tax to the State or county."

"Section 5. The tax hereby levied shall be paid to ~~that~~ *the County Director of Revenue or other* officer or employee of the county chargeable with the duty of collecting *State or county* license or privilege taxes ~~payable to the county~~ *who shall have parallel authority to enforce liens and collect said*

*tax that is now or hereafter provided to collect the license or privilege taxes of the State and counties by the Code of Alabama or other law or regulation including Title 40, Chapters 1, 12, 29 Code of Alabama 1975. Non-payment of said tax is subject to the same liens, penalties and interest as are provided by law for non-payment of State and county license or privilege taxes including Title 40, Chapters 1, 12, 29, Code of Alabama 1975."*

"Section 6. No license or privilege tax levied by the governing body of the county ~~on any persons, for engaging in any~~ *upon the wages or other earnings of any person as an employee of a* business shall be at a rate which is in excess of the rate of ~~license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity~~ *1/2 of 1% of the gross wages or earnings of such employee.*"

Section 3. All laws or parts of laws which conflict with this act are hereby repealed.

Section 4. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.



(B) *The words "vocation, occupation, calling and profession" shall mean* and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, *but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.*

— Ordinance No. 1120
Jefferson County, Alabama